APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176, 93-15640

D.C. No. CV-89-4206-VRW

DOUGLAS MURRAY,
Plaintiff-Appellee-Cross-Appellant,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURRAN, JR.; JESSE DURRAN, SR.; CHARLES J. EVANS; BOB DAVIS,
Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
February 17, 1995—San Francisco, California

Filed May 31, 1995

Amended July 14, 1995

Before: Joseph T. Sneed and Diarmuid F. O'Scannlain, Circuit Judges, and Robert R. Merhige, Jr.,*
District Judge

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* Honorable Robert R. Merhige, Jr., District Judge for the District of Virginia, sitting by designation.

ORDER

The opinion filed May 31, 1995, slip op. 5929, is amended as follows. Insert a new paragraph in section II.A., slip op. at 5942, ¶ 2, line 16, immediately following "(9th Cir. 1994)," and add the following:

> Unlike the situation in *United States v. Tabacca,* 924 F.2d 906 (9th Cir. 1991), the jury in this case had already experienced a significant delay at the outset of deliberations, with the possibility of further delays, when Judge Walker decided to excuse Juror Giancoli. Moreover, the issues of fact and law involved in this case appear to be considerably more complicated than those in *Tabacca,* increasing the risk that further disruption of the deliberation process would dull the jurors' memories and concentration.

The sentence beginning "District court judges must have ample discretion" (slip op. at 5942, ¶ 2, line 16) should follow immediately afterwards.

With the opinion so amended, the panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Cross-Appellees' application for attorney's fees on appeal is denied.

OPINION

SNEED, Circuit Judge:

Appellants, a labor union, four of its officers, and one of its members, appeal from the judgment of the district court, entered after a jury verdict, holding them liable for violating Appellee Douglas Murray's rights under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Murray cross-appeals, claiming that the district court erred by granting directed verdicts in favor of the Appellants on several claims and by refusing to vacate an unfavorable arbitration award.[1] We affirm.

I.

FACTS AND PROCEEDINGS BELOW

Appellant Laborers Union Local No. 324 (the Union) represents construction workers. Appellants Jesse Thomas, Jesse Durrin, Jr., Charles Evans, and Bob Davis are officers of the Union, and Appellant Jesse Durrin, Sr. is a now-retired member of the Union. Appellee and Cross-Appellant Murray is a member of the Union and a longtime dissident. Murray brought suit following a series of clashes with Union officers.

A. *Job Referral*

The first dispute involved a job referral. Ordinarily, Union members are dispatched to jobs as their names come up on the "plug" board in the hiring hall. As jobs are given to those listed at the top of the board, those beneath them move up and are next in line to receive

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[1] Murray brought two suits in district court, which were consolidated: his suit against Appellants and his suit to vacate the arbitration award. These disputes reached this court in the form of three appeals: Appellants' appeal from jury verdicts against them (93-15641), Murray's cross-appeal from adverse directed verdicts (93-16176), and Murray's appeal of the arbitration award (93-16540).

positions. Under certain circumstances, however, employers are allowed to request a Union member by name in a referral letter, in which case the member is dispatched regardless of the position of his name on the plug board.

In December 1988, an employer, National Energy Constructors (NEC), issued a referral letter for Murray and several others. At the time, Murray was attending classes at a training center, of which the Union was aware. Nonetheless, the Union did not attempt in any way to contact Murray. Jesse Durran, Jr., who saw Murray at the training center during December, not only was rude to Murray but did not tell him about the letter.

By the time Murray learned about the referral letter, the job with NEC was apparently no longer available. Murray filed a hiring hall grievance against the Union for not contacting him. The permanent hiring hall arbitrator, Gerald McKay, in due course ruled that the Union was not contractually obligated to tell Murray about the letter.

B. *Collection of Arbitration Costs from Murray's Dues*

When NEC refused to issue a second referral letter, Murray attempted to file a grievance against NEC for discrimination. Instead of following the procedure for a grievance against an employer, however, Murray filed another hiring hall grievance. On July 5, 1989, arbitrator McKay ruled that Murray's complaint could not be redressed through the hiring hall grievance process because his dispute was with NEC, not the Union. He ordered Murray to pay the costs of arbitration for having filed a frivolous hiring hall grievance.

In mid-January 1990, the dispute between Murray and the Union moved to another level when Murray prepaid his union dues in order to maintain his eligibility to run for office in the upcoming election. In February, the Union sent Murray the bill for its arbitration costs, totaling $802, which Murray contested. In March, the Union

informed Murray by letter that it had applied Murray's prepaid dues towards the arbitration costs and would continue to apply Murray's dues until the amount was paid off. Murray paid the full assessment under protest in order to maintain his eligibility to run for office.

C. *Distribution of Literature*

Murray, in an effort to reach the rank and file of Union members, edited and published several editions of a newsletter entitled "Pick and Shovel," which tended to be critical of the Union and its leadership. He distributed it, along with other labor literature, in the Union's hiring halls in various towns over the course of a year. In June 1989, shortly before arbitrator McKay's July 5, 1989 ruling, Murray was setting up to distribute literature in the hiring hall in Martinez, California, when Charles Evans approached him and told him not to hand out literature. Murray refused to leave, and Evans called the police. When the police arrived, they asked whether there was a union rule against distributing literature, to which Evans replied that there was not. The police left without taking any action against Murray.

At the June meeting, the Union membership voted in favor of a rule barring solicitation and distribution of literature in hiring halls during dispatch hours. Signs announcing the "No Solicitation, No Distribution" rule were subsequently posted in the hiring halls.

D. *The October 24, 1989 Meeting*

A regular Union meeting was held on October 24, 1989, at which, as part of the routine agenda, the minutes of the prior meeting were read. During this period, Murray contested the accuracy of the minutes. The minutes were nonetheless approved. The not-easily repressed Murray attempted to speak again during an unrelated agenda topic. The Union president, Jesse Thomas, ruled Murray out of order and demanded repeatedly that he "shut up

and sit down." Union officials, Evans and Davis, joined in the demand. When Murray refused to do so, Thomas ordered Murray to leave. Murray refused. Thomas told the sergeant-at-arms, John Alford, to escort Murray out. Alford hesitated, and Thomas asked the membership generally to help Alford remove Murray. Durran, Jr. approached and tried to pick up Murray's briefcase, but Murray prevented him, and a scuffle ensued. Jesse Durran, Sr. entered the fray and grabbed and pulled Murray's hair. Order was eventually restored when other Union members broke up the fight. Murray remained at the meeting.

Murray did not rest; he filed suit in federal court on November 27, 1989. His first amended complaint alleged various violations of his rights under the LMRDA, breach of the duty of fair representation, assault and battery, and conversion.

A jury trial began on February 16, 1993. Following the presentation of Murray's case, Appellants moved for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. The court rendered judgments in favor of Appellants on the following causes of action: (1) the duty of fair representation claim; (2) the assault and battery claims against the Union, Thomas, Evans, and Davis; (3) the LMRDA claim; and (4) the conversion claim both arising from the Union's collection of arbitration costs from Murray; and (5) the LMRDA claim for infringement of the right to participate in and vote at Union meetings. The remaining claims were submitted to the jury.

The jury found that the Union and three of its officers, Evans, Thomas, and Durran, Jr., had violated Murray's right of free speech under the LMRDA.[2] The jury awarded Murray $100 in compensatory damages, plus

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[2] The jury found that Jesse Durran, Sr. and Bob Davis were not liable for free speech violations.

punitive damages: $50,000 against the Union, $10,000 against Thomas, $10,000 against Durran, Jr., and $7,500 against Evans. The jury further found that Jesse Durran, Sr. had committed assault and battery, and awarded Murray $100 in compensatory damages and $1,000 in punitive damages against him.[3]

The court denied the Union's post-trial motions for judgment as a matter of law and for a new trial. The court granted Murray's motion for attorney's fees and costs and awarded him $28,298.20. In a companion case, the court denied both Murray's motion to vacate the arbitration award and his motion for injunctive relief against the Union.

The Union timely appeals, and Murray timely cross-appeals. This court has jurisdiction under 28 U.S.C. § 1271.

II.

DISCUSSION

A. *Right to a Unanimous Verdict*

The trial lasted three and a half days. Judge Walker then gave the jury their instructions, and they began deliberating at about 12:30 p.m. on a Monday. The next day, events unfolded that presented to Judge Walker a very difficult situation. The jury on that day deliberated only until about 11:00 a.m., because one juror had to leave for a job interview. At that point, Juror Giancoli told the judge that he would have to leave early the following day, Wednesday, to attend a board meeting. The court quite properly expressed concern about the prospect of the jury taking half the day off two days in a row.

On Wednesday, the jury resumed deliberations at 8:00 a.m. The judge received three notes from the jury that

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[3] The jury found in favor of Jesse Durran, Jr. on the assault and battery claim against him.

morning.[4] The first note, unsigned, stated: "1) JURY CANNOT REACH UNANIMOUS -VERDICT. 2) JURY CANNOT REACH UNANIMOUS DETERMINATION AS TO SCHEDULE TO ACCOMMODATE ALL." A schedule of juror conflicts was attached. At 9:00, a note signed by Juror Giancoli was received. It read, "JURY IS HOPELESSLY DIVIDED."[5] Fifteen minutes later, another note was sent out. It read, "We the undersigned believe the jury has come so close to a final verdict that we would like to continue deliberating." The note was signed by seven jurors—all but Juror Giancoli. Obviously the signals being sent by the jury were mixed.

Judge Walker thereupon excused Juror Giancoli from service in order to allow the remaining jurors to continue deliberations that afternoon.[6] After Juror Giancoli was excused, the jury deliberated for another half an hour before reaching their verdict. It was learned after trial that Juror Giancoli was the holdout in favor of a defense verdict.

Appellants claim that their right to a unanimous verdict was violated, and that they were entitled to a new trial. The Seventh Amendment requires jury verdicts in federal civil cases to be unanimous. *Johnson v. Louisiana,* 406 U.S. 356, 369-70 & n.5 (1972) (Powell, J., concurring); *Andres v. United States,* 333 U.S. 740, 748 & n.13 (1948); *American Publishing Co. v. Fisher,* 166 U.S. 464, 467-68 (1897); *see also* Fed. R. Civ. P. 48 ("Unless the parties otherwise stipulate, . . . the verdict shall be unanimous . . . ."). While Rule 47(c) of the Federal Rules of Civil Procedure allows a judge to excuse

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[4] *See* Appellants' E.R. (hereinafter "E.R.") at 200-03.

[5] Following that statement were two phrases that were crossed out but still legible: "PEOPLE ON EITHER SIDE" and "At least one person on each side[.]"

[6] *See* E.R. at 205-06.

a juror from service during deliberation for good cause, "[i]t is not grounds for the dismissal of a juror that the juror refuses to join with fellow jurors in reaching a unanimous verdict." Fed. R. Civ. P. 47(c), advisory committee note (1991 amendment); *see also United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988) ("That a juror may not be removed because he or she disagrees with the other jurors as to the merits of a case requires no citation."), *cert. denied*, 489 U.S. 1032 (1989).

This type of case readily invites an appellate court to second-guess a trial court. This is a temptation we must resist while protecting the right of all parties to the judgment of the jury that was selected to hear the case. As already indicated, this right is a qualified one. Jurors are people whose needs and circumstances sometimes must be ascendent.

In support of their claim, Appellants rely mainly on *Hernandez*. In that case, the Second Circuit reversed the defendants' convictions because the trial court judge had improperly removed the lone holdout for acquittal from the jury. During deliberations, the other jurors sent several notes to the judge. At first, the notes complained of the juror's disruptiveness and lack of "rational common sense." *Id.* at 20. The judge, after being informed that the juror might have mental problems, considered removing him, but instead decided "to wait and [see] what I am going to do if there is a hung jury. I won't cross the bridge now." *Id.* at 21. Later, the notes from the jury indicated that the eleven other jurors were "making some progress" with the holdout juror. *Id.* After another day of deliberations, when it became clear that the juror would not "change his mind," the judge excused him. *Id.* at 21-22. After half an hour more of deliberations, the jury returned guilty verdicts against all the defendants. *Id.* at 22. The trial judge had waited too long before removing the disturbed juror.

The Second Circuit reasoned that it could not "be confident that [the juror's] disagreement with his colleagues was not the cause of his removal." *Id.* at 23. Even if removal of the juror for mental incompetence was justified, it should have been done as soon as that incompetence was evident. Instead, the judge waited two days to see whether the jury would deadlock. "The record thus seems to reflect that the cause of the removal was as much to avoid a mistrial because of a hung jury as to excuse an incompetent juror." *Id.* The combination of the uncertainty of the record regarding the cause of removal, the delay, and the judge's prejudicial remarks [7] to the jury required reversing the convictions. *Id.*

This case is different. In this case, the notes from the jury are ambiguous. They do not create a compelling inference that the jury was split between Juror Giancoli and the remaining jurors. Judge Walker moved promptly. Neither his remarks nor his actions indicate in any way that he chose to remove Juror Giancoli because he perceived him to be the lone obstacle to a unanimous decision.

Furthermore, we find that, under the circumstances of this case, the removal of Giancoli due to his scheduling conflict meets the "good cause" standard. Although "[s]ickness, family emergency or juror misconduct that might occasion a mistrial are examples of appropriate grounds" for excusing a juror, Fed. R. Civ. P. 47(c) advisory committee's note (1991 amendment), the judge's

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[7] The Second Circuit noted that

> whatever small possibility existed of continuing with the remaining eleven jurors . . . was eliminated by the district judge's remarks to the jury . . . . Those remarks praised the eleven lavishly for their efforts to persuade [the holdout juror] to vote to convict. . . . [T]he effect was to eliminate any possibility that the remaining eleven jurors could resume deliberations with an open mind.

Id. at 24.

discretion is not limited to those scenarios. " '[J]ust cause' . . . embraces all kinds of problems—temporary as well as those of long duration—that may befall a juror during jury deliberations." *United States v. Reese,* 33 F.3d 166, 173 (2d Cir. 1994), *cert. denied,* 115 S. Ct. 756 (1995). Thus, for example, the decision to excuse a juror who had to attend a week-long business trip has been approved. *Reese,* 33 F.3d 166. This court has even upheld the decision to excuse a juror who had a planned vacation. *United States v. McFarland,* 34 F.3d 1508 (9th Cir. 1994).

Unlike the situation in *United States v. Tabacca,* 924 F.2d 906 (9th Cir. 1991), the jury in this case had already experienced a significant delay at the outset of deliberations, with the possibility of further delays, when Judge Walker decided to excuse Juror Giancoli. Moreover, the issues of fact and law involved in this case appear to be considerably more complicated than those in *Tabacca,* increasing the risk that further disruption of the deliberation process would dull the jurors' memories and concentration. District court judges must have ample discretion to control their dockets. The removal of Juror Giancoli for good cause early in the day in order to allow the rest of the jury to continue deliberating was entirely proper.

B. *Infringement of Murray's Free Speech Rights*

The Union also argues that the jury verdicts finding violations of Murray's speech rights are unsupported by the evidence and contrary to law. Jury verdicts are reviewed to determine whether they are supported by "substantial evidence," that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Davis v. Mason County,* 927 F.2d 1473, 1486 (9th Cir.), *cert. denied,* 502 U.S. 899 (1991). The credibility of witnesses and the weight of the evidence are issues for the jury that are generally not sub-

ject to appellate review. *Oviatt v. Pearce*, 954 F.2d 1470, 1473 (9th Cir. 1992).

In particular, the Union argues that neither its failure to contact Murray about the NEC referral letter nor the "No Solicitation, No Distribution" rule can, as a matter of law, form the basis of an LMRDA violation. Perhaps so. Nonetheless, there remains substantial evidence in the record to support the jury's verdicts. Specifically, evidence of the attempt to confiscate Murray's newsletters, the events of the October 24, 1989 meeting, and the Union's application of Murray's prepaid dues to the arbitration award [8] all suffice to establish a "general scheme to suppress dissent within the union" sufficient to prove a violation of §§ 101(a)(2) and 102 of the LMRDA.[9] *Phelan v. Local 305 of the United Ass'n of Journeymen*, 973 F.2d 1050, 1063 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1415 (1993). Clearly, the jury believed Murray's version of events.

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[8] The Union appears to argue that the jury should not have been allowed to consider evidence concerning its actions in applying Murray's prepaid dues to the arbitration award because Murray failed to exhaust his administrative remedies. However, in cases brought under the LMRDA, whether to require exhaustion of internal union procedures is a matter left to the district court's discretion. *Ornellas v. Oakley*, 618 F.2d 1351, 1354 (9th Cir. 1980). There is no indication that Judge Walker abused his discretion in not requiring exhaustion here, particularly given that the Union did not raise the exhaustion issue until the eve of trial.

[9] The statute provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting . . . .

LMRDA, § 101(a)(2), 29 U.S.C. § 411(a)(2). Section 102 creates a federal cause of action for infringement of the rights provided in § 101. LMRDA, § 102, 29 U.S.C. § 412.

C. *Punitive Damages*

The Union contends that the punitive damages awards against it and its officers are constitutionally excessive. Appellants point to the fact that the punitive damages totaled nearly 800 times the compensatory damages.[10]

Punitive damages awards must comply with the standard established by this circuit in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994).[11] *Morgan* establishes a three-part test to determine whether a punitive damages award violates due process.[12]

First, this court must ascertain whether the trial court properly instructed the jury on the purpose of punitive damages, "so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from such conduct in the future." *Id.* at 1256. The record clearly shows that Judge Walker complied with this mandate in instructing the jury.[13]

Second, the trial judge must have given its reasons for upholding the punitive damages award on the record and, in doing so, make some comparison between the amount of punitive damages actually assessed and an alternative figure derived from the facts of the case at hand, as well as from awards in similar cases and the experience of the court. *Id.* at 1257. In this case, Judge Walker ex-

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[10] For the LMRDA violations, Murray was awarded $100 in compensatory damages and $77,500 in punitive damages against the Union and four of its officers.

[11] This court developed the *Morgan* standard to comply with the Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

[12] The test is equally applicable to punitive damages imposed by state or federal courts. *Morgan*, 997 at 1255.

[13] *See* Reporter's Transcript ("R.T.") at 4-735.

plained that the punitive damages, albeit much higher than the compensatory damages, were justified:

> What Mr. Murray was deprived of was his free speech rights. That's the sort of thing you can't really put a price tag on. And the jury was, as I understood it, saying that there is no price tag that can be put on that sort of thing, but there's certainly a reason to discourage the union from attempting to stifle the free speech rights of its members.[14]

We cannot fault his reasons for upholding the punitive damages awards against Appellants.

Third, this court must review the punitive damages award for excessiveness. *Id.* at 1257-58. "A circuit court should determine whether a punitive damages award exceeds the amount necessary to accomplish the goals of punishment and deterrence in deciding whether it is grossly excessive." *Id.* at 1258 (applying the standard set by *Haslip*, 499 U.S. at 17). Given the seriousness of the infringement on Murray's freedom of speech, we find that the punitive damages awards in this case are not grossly excessive.

D. *Attorney's Fees*

The Union argues that the district court's award of attorney's fees to Murray was improper because the litigation did not provide a "valuable service"[15] to the union membership. We permit successful plaintiffs to recover attorney's fees under the LMRDA where (1) the opposing party acted in bad faith, or (2) the litigation performed a valuable service for the union and its mem-

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[14] E.R. at 491.

[15] In its brief, the Union used the term "substantial benefit"; however, the terms "valuable service" and "substantial benefit" are synonymous. *Southerland v. International Longshoremen's & Warehousemen's Union*, 845 F.2d 796, 799 (9th Cir. 1987).

bers. *Ross v. International Bhd. of Elec. Workers,* 544 F.2d 1022, 1025 (9th Cir. 1976). A finding of valuable service is reviewed under the clearly erroneous standard. *Southerland,* 845 F.2d at 799.

The district court's award of attorney's fees to Murray was not clearly erroneous. Judge Walker found support based on both bad faith and valuable service.[16] The vindication of Murray's speech rights performed a valuable service for the union membership. While Murray may well have been a nuisance to the Union leadership, they suppressed him at their peril. The common good is often advanced prudently by visionary nuisances speaking freely. In addition, the evidence on the record and the jury's award of punitive damages support a finding that the Union and its officers acted in bad faith.

E. *Judgments As a Matter of Law*

Nuisances are not always right, however. In his cross-appeal, Murray contends that the district court erred by entering judgment as a matter of law in favor of Appellants on four of his claims. A directed verdict is reviewed *de novo. Zamalloa v. Hart,* 31 F.3d 911, 913 (9th Cir. 1994). "[A] directed verdict is proper when the evidence permits only one reasonable conclusion as to the verdict." *McGonigle v. Combs,* 968 F.2d 810, 816 (9th Cir.), *cert. dismissed,* 113 S. Ct. 399 (1992). We now address each of these claims.

1. *Breach of the duty of fair representation claims.*

a. *Re NEC referral letter.*

The trial court properly granted Appellants' motion for a directed verdict on this issue. It is clear from the evidence that the Union did not make a regular practice of notifying Union members at the training center about

[16] R.T. (July 30, 1993) at 21.

referral letters, although the Union had done so on occasion. There is no such requirement in the collective bargaining agreement. The Union did not, therefore, have any duty to notify Murray of the referral letter. Accordingly, it did not breach its duty of fair representation by failing to do so.

b. *Re handling of the NEC grievance.*

Murray also seeks to bring a breach of the duty of fair representation claim based on the Union's alleged mishandling of his NEC grievance, which Murray mistakenly brought as a hiring hall grievance and had costs assessed against him as a result. This claim, however, is time-barred because it was not brought within six months of the arbitrator's written decision. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986).[17] Murray is not entitled to application of the relation-back doctrine because the facts involving the Union's conduct during the grievance procedure were not alleged in Murray's original complaint. *Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 979 (9th Cir. 1988). The grant of the directed verdict to Appellants on this issue was therefore proper.

2. *Unlawful discipline under the LMRDA.*

Murray next argues that the Union's actions in taking his prepaid dues and applying that money to the arbitration costs assessment—thereby forcing him to pay the entire assessment in order to maintain his good standing as a member and eligibility to run for union office—constituted "discipline" for purposes of § 101(a)(5) of the LMRDA.

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[17] Murray argues that he is entitled to equitable estoppel based on the Union's delay in billing him for the costs awarded by the arbitrator's decision. We reject this argument. The fact that the Union did not promptly send Murray the bill did not change the fact that Murray was on notice as of the arbitrator's decision on July 5, 1989 that those costs were going to be assessed against him. His delay in filing his duty of fair representation claim is therefore not excused.

As such, Murray claims, those actions violated his rights because he was not afforded the due process provided under § 101(a)(5).

First we consider whether Murray was subjected to discipline. "Discipline" under § 101(a)(5) is a retaliatory act that affects a union member's rights or status as a member of the union. *Finnegan v. Leu,* 456 U.S. 431, 437 (1982); *Lynn v. Sheet Metal Workers' Int'l Ass'n,* 804 F.2d 1472, 1478 (9th Cir. 1986), *aff'd,* 488 U.S. 347 (1989). Murray maintains that the dues were taken and applied to the arbitration award in retaliation for Murray's speech activities. As he sees it, the Union's action was discipline because, but for his intervention, it would have resulted in the loss of his membership through "nonpayment" of dues, as well as his ineligibility to run for union office, and therefore amounted to discipline.

Assuming *arguendo* that taking Murray's prepaid dues to satisfy the arbitration costs was a form of discipline, the question remains whether Murray was denied due process. Here Murray encounters difficulty. He claims he was entitled to a hearing before the Union applied his dues to the outstanding arbitration award. In support of his position, Murray cites *English v. Cowell,* 969 F.2d 465 (7th Cir. 1992), which held that a union could not, based on a member's felony conviction, terminate his union membership without a hearing. *English,* however, is easily distinguishable. There the court reasoned that expulsion from the union did not *necessarily* follow from the member's criminal conviction, although it certainly could be reason enough to expel the member. *See id.* at 471. In other words, the member was still entitled to the determination that the felony conviction warranted expulsion.

Here, by contrast, Murray had *already* received notice and a full hearing before the *assessment* of arbitration hearing). The application of Murray's dues money to the

arbitration award was only an *execution* on the judgment. There was nothing left to have a hearing about, no decision left to be made. *See id.* at 471 n.12. No additional hearing was necessary, and the Union's actions did not violate § 101(a)(5). It was Murray's obligation to replenish his dues. No hearing was necessary to fix that obligation. Thus, the district court correctly granted the Union's motion for a directed verdict on this issue.

3. *Conversion.*

Here Murray attempts to refute the basis of the above holding by arguing that the Union's taking his prepaid dues and applying them to the arbitration award amounted to conversion. This argument is meritless. By definition, conversion involves the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels *belonging to another.*" *Black's Law Dictionary* 300 (5th ed. 1979) (emphasis added). The Union did not have mere lawful possession of Murray's dues, it also had lawful *title* to them. Murray had no ownership rights in his prepaid dues with which the Union could interfere. Accordingly, the district court did not err in granting the Union's motion for a directed verdict on this issue.

4. *Assault and battery.*

Murray also insists that the jury should have been allowed to decide the assault and battery claims against the Union, Thomas, Davis, and Evans. None of these defendants actually touched Murray. Murray argues that they are nonetheless vicariously liable. He relies on *Coats v. Construction & Gen. Laborers Local No. 185*, 15 Cal. App. 3d 908, 93 Cal. Rptr. 639 (1971), which held that a union could be held liable for a series of brutal assaults committed by its officers where it ratified their actions by not disciplining them.

Coats is distinguishable. In this case, ratification is lacking. Here the jury found Durran, Jr., the only officer

who actually had physical contact with Murray, not liable for assault and battery. Durran, Sr., who was found liable, was only a rank-and-file member. Although the record shows that Union officers were irritated by Murray, ruled him out of order, told him to sit down and shut up, and forced him to leave meetings on several occasions, these actions do not show that the Union's officers incited or encouraged Durran, Sr.'s assault against Murray. Nor does Murray point to any evidence in the record that shows the Union expressly or impliedly ratified Durran, Sr.'s assaultive behavior. Judge Walker correctly granted Appellants' motion for a directed verdict on these claims.

F. *Denial of Murray's Motion to Vacate the Arbitration Award*

Murray, fiercely contesting all issues on which he did not prevail, argues that the district court erred in denying his motion to vacate the McKay arbitration award, which assessed costs against him. Again, Murray's argument fails.

First, Murray's motion was untimely. It was not brought within 100 days of the arbitrator's written decision of July 5, 1989. Murray insists that the decision was not final because the actual amount of the costs was not known to him until the Union sent a bill on February 20, 1990. Contrary to Murray's suggestion, the decision *was* final. The dispute resolution process was exhausted. *Kemner v. District Council of Painting & Allied Trades No. 36*, 768 F.2d 1115, 1119 (9th Cir. 1985). This was not a case in which the arbitrator retained jurisdiction to decide the remedy, thereby implying an intent that the award not be final. *See Millmen Local 550 v. Wells Exterior Trim*, 828 F.2d 1373, 1376-77 (9th Cir. 1987). Rather, it was a purely technical matter for the Union to send its bill for costs.[18] Murray knew, as of the

[18] The arbitrator's decision specified that Murray pay for the costs of his services and of the hearing transcript. E.R. at 403.

arbitrator's decision on July 5, 1989, that costs were being assessed against him. He has no excuse for his delay in appealing the arbitrator's decision to award those costs.

Second, the motion was properly denied on the merits as well. The scope of review of labor arbitration decisions is extremely narrow and highly deferential. *Federated Dep't Stores v. United Food & Commercial Workers Union,* 901 F.2d 1494, 1496 (9th Cir. 1990). The grievance procedure under the collective bargaining agreement is viewed as part of the bargain; therefore, " '[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' " *Id.* (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960)).

In this case, the arbitrator interpreted the collective bargaining agreement to allow him to award costs based on his power to "adjust grievances." That interpretation is a "plausible" one, and therefore must be enforced by this court. *Id.* There is no indication that McKay dispensed his "own brand of industrial justice," that he exceeded the boundaries of the issues submitted to him, or that the award is contrary to public policy. *Id.*

The judgment of the district court is therefore AFFIRMED in all respects.

APPENDIX B

[Filed Feb. 24, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LABORERS UNION LOCAL 324; JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS and BOB DAVIS

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiff shall recover jointly and severally his actual damages of $100.00 from Laborers' Union Local No. 324, Jesse Thomas, Jesse Durran, Jr., Jesse Durran, Sr., and Charles Evans and shall recover individually punitive damages of $50,000.00 from Laborers' Union Local No. 324, punitive damages of $10,000.00 from Jesse Thomas, punitive damages of $10,000.00 from Jesse Durran, Jr., punitive damages of $7,500.00 from Charles Evans and punitive damages of $1,000.00

from Jesse Durran, Sr., all with interest thereon at the rate of 3.45 per cent as provided by law and plaintiff shall also recover his costs of suit. Plaintiff shall take nothing from defendant Bob Davis.

Date February 24, 1993

RICHARD W. WIEKING
Clerk

/s/ Wynette Bailey
(By) Deputy Clerk

APPENDIX C

[Filed Feb. 24, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-89-4206-VRW
C-90-1712-VRW

DOUGLAS MURRAY,

Plaintiff,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS, and BOB DAVIS,

Defendants.

SPECIAL VERDICT

WE, THE JURY, FIND AS FOLLOWS ON THE QUESTIONS SUBMITTED TO US:

QUESTION NO. 1.

A. Do you find that plaintiff has proven that defendants, or any of them, have violated his free speech rights under the Labor Management Reporting and Disclosure Act? Answer "Yes" or "No" as to each of the following defendants.

Laborers Union Local No. 324	Yes
Jesse Thomas	Yes
Jesse Durran, Jr.	Yes
Jesse Durran, Sr.	No
Charles Evans	Yes
Bob Davis	No

If you have answered "Yes" as to any defendant;

B. Do you find that plaintiff was damaged as a result of the violation you have found?

Yes ✔ No ———

C. If you find plaintiff was damaged, what amount of damages do you find plaintiff sustained?

$100.00

D. Do you award punitive damages against any defendant because it or he acted with malice or reckless or wanton indifference to, or disregard of, plaintiffs' rights under the Labor Management Reporting and Disclosure Act? If your answer is "Yes" as to any defendant, write the amount of punitive damages you award against that defendant opposite their name. If your answer is "No" as to any defendant for whom you find liability, write "No" opposite their name.

Laborers Union Local No. 324	$50,000.00
Jesse Thomas	10,000.00
Jesse Durran, Jr.	10,000.00
Jesse Durran, Sr.	N/A
Charles Evans	7,500.00
Bob Davis	N/A

QUESTION NO. 2.

A. Do you find that plaintiff has proven that defendants Jesse Durran, Jr. and/or Jesse Durran, Sr. are liable to him for assault and battery? Answer "Yes" or "No" as to each of the following defendants.

Jesse Durran, Jr.	No.
Jesse Durran, Sr.	Yes.

B. If you have answered any part of this question "Yes," do you find that plaintiff was damaged as a result of the violation you have found?

Yes ✔ No ———

C. If you find plaintiff was damaged, what amount of damages do you find that plaintiff suffered:

Jesse Durran, Jr.	$ N/A
Jesse Durran, Sr.	$100.00

D. Do you award punitive damages against either defendant Jesse Durran, Jr. or Jesse Durran, Sr. because he was guilty of oppression, fraud or malice in the conduct on which you base your finding of liability? If your answer is "Yes" as to either defendant, write the amount of punitive damages you award against that defendant opposite his name. If your answer is "No" as to both defendants, please date and sign this Verdict.

Jesse Durran, Jr.	$N/A
Jesse Durran, Sr.	$1,000.00

* * *

The foregoing answers to the questions which have been asked of us are the unanimous verdict of the Jury.

Dated: February 24, 1993 /s/ Kelly Plughoff
Foreperson of the Jury

APPENDIX D

[Filed Aug. 14, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 93-15641, 93-16176, 93-16540

DC No. CV-89-4206-VRW

DOUGLAS MURRAY,
Plaintiff-Appellee-Cross-Appellant,

v.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURRAN, JR.; JESSE DURRAN, SR.; CHARLES J. EVANS, BOB DAVIS,
Defendants-Appellants-Cross-Appellees.

ORDER

Before: SNEED, Circuit Judge.

Appellants/Cross-Appellees' motion for recall of mandate and for stay of mandate pending the filing of petition for writ of certiorari to the United States Supreme Court is denied.

APPENDIX E

[Filed May 11, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No: C 89 4206 VRW

DOUGLAS MURRAY,
Plaintiff-Appellee
vs.

LABORERS UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., and CHARLES EVANS,
Defendants-Appellants

ORDER OF STAY PENDING APPEAL AND APPROVING SUPERSEDEAS BOND

This matter came on ex parte upon the Application of attorneys for Defendants for a stay of enforcement pending the outcome of an appeal pursuant to Rule 62, FRCP. Having read and considered the application and the accompanying declaration and attached copy of supersedeas bond, and good cause appearing, it is ordered as follows:

The supersedeas bond is hereby approved, and no execution shall issue upon the judgment entered in this case, nor shall proceedings be taken for its enforcement pending the outcome of the appeal taken in this matter.
May ——, 1993

/s/ Vaughn R. Walker
HONORABLE VAUGHN R. WALKER
United States District Judge

APPENDIX F

[Filed Apr. 29, 1993]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15641

DC# CV-89-04206-VRW
Northern California
(San Francisco)

DOUGLAS MURRAY,
Plaintiff-Appellee,

vs.

LABORERS UNION LOCAL NO. 324, *et al.*,
Defendants-Appellants.

ORDER

Before: KOZINSKI and RYMER, Circuit Judges

The emergency motion for a stay of the judgment pending appeal is denied.

The April 12, 1993 time schedule order remains in effect.

APPENDIX G

[Filed Mar. 8, 1993]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No: C 89-4209 VRW
C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., CHARLES EVANS, and BOB DAVIS,

Defendants.

ORDER GRANTING STAY OF EXECUTION ON JUDGMENT PENDING OUTCOME OF POST-TRIAL MOTIONS

This matter having come before the Court by way of Defendants Motion for Stay of Execution of Judgment Pending Disposition of Motion for New Trial and Motion for Judgment as a Matter of Law, the Court having reviewed the Declaration of Sandra Rae Benson filed concurrently therewith, and the Court being advised of the premises;

THE COURT HEREBY FINDS, that in the interests of fairness and justice, a stay of execution of, or any proceedings to enforce, the Judgment in this case should be entered pending the disposition of Defendants' post-trial Motions. Accordingly;

IT IS HEREBY ORDERED, pursuant to the discretion vested in this Court by Fed.R.Civ.Pro. 62(b) that the Judgment in this case shall be stayed, and no proceedings to enforce the Judgment shall be entertained, pending the disposition by this Court of Defendants' Motion for New Trial, and Motion for Judgment as a Matter of Law.

DATED: March 8, 1993

/s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

APPENDIX H

STATUTORY PROVISIONS

29 U.S.C. §§ 158, 159, 411, 412, 529

§ 158.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

§ 159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization of an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, Initiation fees, and assessments

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or

in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Pub.L. 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522.)

§ 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Pub.L. 86-257, Title I, § 102, Sept. 14, 1959, 73 Stat. 523.)

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

(Pub.L. 86-257, Title VI, § 609, Sept. 14, 1959, 73 Stat. 541.)

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: 2/24/93

1) Jury cannot reach unanimous verdict.

2) Jury cannot reach unanimous determination as to schedule to accommodate all. Please see attached schedule/restrictions.

Thank You.

/s/ Kelly Plughoff
Jury Foreperson

C 89-4206 VRW
C 90-1712 VRW

Jury Schedule/Restrictions
through Friday 2/26/93

Betty Bowers—No restrictions

Paula Caroe—Retires on Friday—Would prefer to attend celebration activities Thursday and Friday

Rolland DeWolk—Must leave at 4:00 today. No restrictions Thursday and Friday

Robert Maagdenberg—Must leave at 4:30 today. No restrictions Thursday and Friday

Doug Giancoli—Must leave at 11:15 today. No restrictions Thursday and Friday

Richard Montoya—No restrictions

Russ Frost— "

Kelly Plughoff— "

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Number: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: 2-24-93

Time: 9:00 a.m.

Jury is hopelessly divided.

/s/ D Giancoli
Jury Foreperson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case Numb[illegible]: C 89-4206 VRW
C 90-1712 VRW

DOUGLAS MURRAY

v.

LOCAL 324, *et al.*

NOTE FROM THE JURY

THE JURY REQUESTS THE FOLLOWING:

Date: FEB 24, 1993

Time: 9:15 AM

We the undersigned believe the jury has come so close to a final verdict, that we would like to continue deliberating.

Sincerely,

/s/ Paula Caroe

/s/ Betty Bowers

/s/ Roland DeWolk

/s/ Kelly Plughoff

/s/ Richard Montoya

/s/ Robert Maagdenberg
Jury Foreperson

/s/ Russ Frost

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VAUGHN R. WALKER, JUDGE

No. C 89-4206 VRW
No. C 90-1712 VRW

DOUGLAS MURRAY,

Plaintiff,

VS.

LABORERS UNION LOCAL NO. 324; JESSE THOMAS; JESSE DURAN, JR.; JESSE DURAN, SR.; CHARLES EVANS; and BOB DAVIS,

Defendants.

---

[2] Wednesday, February 24, 1993

(Open Court, jury not present:)

THE CLERK: Calling Civil 89-4206 and Civil 90-1720, Douglas Murray versus Local 324.

Counsel, your appearances for the record, please.

MR. KATZENBACH: Good Morning, Your Honor. Christopher W. Katzenbach appearing for the plaintiff.

THE COURT: Mr. Katzenbach.

MS. BENSON: Good Morning, Your Honor. Sandra Benson for the defendants.

THE COURT: Miss Benson.

The clerk, I believe, has given you both copies of the messages that we have received from the jury.

(Pause in Proceedings)

THE COURT:Looking at these, it appears that the juror who has the restriction with respect to his ability to participate in the deliberations is Mr. Giancoli, who must leave at 11:15 today. All of the others have no restriction on further participation in deliberations today.

And those jurors in the note at 9:15 state that they believe that they are close to a verdict and that they should continue to deliberate.

In light of Mr. Giancoli's commitment, my belief is that he should be excused and the remaining seven jurors [3] continue to deliberate for the balance of the day.

MR. KATZENBACH: Your Honor, I think that's appropriate.

THE COURT: Miss Benson.

MS. BENSON: Well, Your Honor, I'm. . . I'm a little concerned, because we don't know exactly what the division is, obviously.

THE COURT: No, and that—obviously, we can't—

MS. BENSON: We can't. I know that.

THE COURT: We can't determine—

MS. BENSON: That's right.

THE COURT: —what our position is.

But we face a practical problem: One Juror, who's got a commitment today, and the others who would like to continue deliberating and who are available to do so.

MS. BENSON: I realize that.

I'm just concerned, because I'm not sure if there really is any rule, certainly not one that I'm aware of, that. . .

I think at this point we may be facing a mistrial, which none of us really want. I think we realize that.

THE COURT: What would be the mistrial basis?

MS. BENSON: In the event we have a hung jury, which, if all eight of them stay on the jury, it looks like there may be a possibility that we're not going to get a unanimous verdict.

[4] I'm a little concerned about one juror's simply being removed from the jury panel because he can't deliberate today.

THE COURT: Well, it wouldn't be any different from a situation that we would confront if Mr. Giancoli were to become ill, for example, or encounter some misfortune which would preclude him from participating.

MS. BENSON: Sure. I understand that's a physical problem.

I think at this point—and I'm certainly speculating, but I'm getting the impression that we may have a division of seven-one at this point—

THE COURT: Maybe—

MS. BENSON: —And—

THE COURT: But maybe not.

MS. BENSON: You're absolutely correct. This is purely speculation.

There is nothing that is physically preventing Mr. Giancoli from continuing with the deliberations other than his own business schedule of having a board meeting, apparently.

I just am reluctant to say, let's let him go, because I—I mean, I just—I think we may be affecting the outcome of this verdict in a way which whomever loses the case—and I don't know who that person is going to be—would

be prejudiced by the fact that where the person might have ended up with a hung jury will end up with an adverse verdict simply because one [5] juror was allowed to leave because of his own business schedule as opposed to any physical or inability to continue.

I think you understand what I'm saying, as—it's just a—I'm having sort of a gut feeling here that this may not be what we want to do.

THE COURT: Well, I'd much prefer to have the jury continue as a whole, but the reason we have eight that we impanel is to deal with a situation such as this, or the myriad other circumstances which may arise in the course of the trial.

And I think we simply have to face the fact that we've got a juror who has a commitment, which is apparently a long-standing one. And, bear in mind, the circumstance is not in any way attributable to Mr. Giancoli. I originally told the panel that I thought we'd get the evidence in by Thursday of last week. We didn't do so, and so the case carried over until this week, and it was not unreasonable for him to go about his life and to make commitments to be places, and so he cannot be blamed in any way for this circumstance.

MS. BENSON: I understand that.

May I make one suggestion, Your Honor? I know yesterday you mentioned to them that if there were instructions they felt they needed further clarification on, that you would be happy to do so.

Perhaps—I mean, Mr. Giancoli still has an hour and 15 minutes before he has to leave. Perhaps when you bring them [6] in, you could remind them, "is there—is there a certain area that you would like the court to give some further instructions or clarification," just to see if—if there is an area where maybe you can assist them in breaking whatever deadlock there is.

And then if, come 11:30, this hasn't helped, then I can see that we're facing this problem. But maybe just reminding them that you can give them some clarification

if there's something that's really sticking, that maybe that might help them a little bit.

THE COURT: Well, all right. After all, I made that offer yesterday and we haven't had any—

MS. BENSON: They haven't taken us up on it.

THE COURT: No, they haven't taken us up on it.

And you recall Mr. Frost said on the way out or asked on the way out whether we could have portions of the transcript read back, and I gave him the usual response, which is, "yes, with difficulty, we could." And we haven't had a request for any readback, either, so—

MS. BENSON: Yes, I realize that. And they obviously know what the sticking point is and we don't—

THE COURT: That's right.

MS. BENSON: —And so—

THE COURT: So I don't think—and this is an intelligent jury, and they obviously know how to communicate.

[7] So I think we should simply bring them in and tell them that . . . I'm prepared to excuse Mr. Giancoli in light of his commitments and in light of the ability of the others to continue their deliberations, and suggest that they do so. All right.

(Open Court, jury present:)

THE COURT: All right. Good morning, ladies and gentlemen.

THE JURORS: Good morning.

THE COURT: Thank you for your notes.

I have had an opportunity now to discuss with the lawyers at some length about basically what we confront as a scheduling problem.

Mr. Giancoli has a meeting today which he needs to attend. And after thoroughly considering the matter and discussing it with the lawyers, I'm prepared, Mr. Giancoli, to excuse you from further participation in the—in the jury.

The reason we have eight people on a civil jury when we only need six for a verdict is to deal with situations such as this, or the myriad other situations which arise sometimes in the course of a trial, when one or more members of the panel are unable to go the distance, and you're in that situation.

* * * *

APPENDIX K

A MATTER IN ARBITRATION

IN A MATTER BETWEEN:

DOUGLAS MURRAY,

(Grievant)

and

LABORERS' UNION, LOCAL 324,

(Union)

Grievance: Hiring Hall Claim of Douglas Murray

Hearing: April 6, 1989

Award: May 19, 1989

DECISION AND AWARD
GERALD R. McKAY, ARBITRATOR

STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which provides for an open hiring hall.[1] The grievant has claimed the Union violated his rights as provided for in the collective bargaining Agreement with respect to the hiring hall provisions. This arbitrator was selected by the provisions of the collective bargaining Agreement to sit as the permanent hiring hall arbitrator. A hearing on

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[1] Joint Exhibit #1.

the complaint of Mr. Murray was held on April 6, 1989. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the arbitrator issued a decision from the bench. This writing is a confirmation of the decision which is set forth in the transcript of the proceedings.

ISSUE

Did the Union violate the provisions of the hiring hall Agreement as contained in the Laborers' Master Agreement in the manner in which it treated Mr. Murray? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Section 3—Employment and Discharge

B. Employment

(6)(e) No person shall be dispatched pursuant to the provisions of subsections 6(a), 6(b) or 6(c) of this Section unless the Individual employer's request is in writing, dated, is signed by an appropriate management representative, specifies whether the person is a rehire, and names the job for which rehire is requested.

Second, persons who, within five (5) years immediately preceding the job order, performed work covered under this Agreement in the geographical area covered by this Agreement in the order in which they registered.

Third, persons who are registered in the order in which they registered by qualification.

(7) Available or employment shall meant: All persons eligible for referral shall be present at the hiring hall or present at their residence phone if they live at a location specified in subsection (2) of this subsection

3B during dispatching hours, unless excused for the following reasons:

(a) When a death occurs in the immediate family, from the date of death and not exceeding one week after the date of burial; however, they shall produce bona fide proof of such death.

(b) Persons on jury duty, providing they produce bona fide proof that they are serving on a jury.

(c) Persons temporarily serving in the U.S. Military Reserve, providing they show a bona fide proof of such service.

(d) Attendance of Workers' Compensation Hearing or any Administrative or court appearance.

BACKGROUND

The grievant is a member of Local 324 and is registered in the hiring hall operated by the Union. According to the grievant, on about January 3, 1989, he learned that an employer by the name of N.E.C. had requested his services as a laborer on a job in which they were acting as the contractor. It is the contention of Mr. Murray that no one from the Union made any effort to inform him of the employer's request for the N.E.C. job. As a result of the Union's failure, Mr. Murray contends, he lost wages and benefits which he otherwise would have earned. It was the position of the Union that it never obtained a letter from N.E.C. requesting that the grievant be dispatched to a job. Furthermore, the Union asserted, the grievant was not available for work within the meaning of that language of the Contract because, at the time the alleged request was made, the grievant was in a Union-sponsored training program.

A letter dated December 7, 1988 and signed by Ronald (Buz) Phillips was introduced by Mr. Murray as the letter requesting his services. This letter states, "Would

you please clear Douglas Murray, SS#136-84-8903, for the Co.-Generation Plant at 2100 Wilbur Avenue, Antioch, California, for National Energy Constructors." [2] Mr. Phillips testified that the way letters of this type are generated is that the employee comes to the employer seeking work. If the employer decides that the employee might be somebody who could perform good services, it issues a letter and gives it to the employee. The employee then takes the letter to the Local Union and receives a dispatch. According to Mr. Phillips, it has been his experience that the Union will not issue a dispatch unless the employee takes the letter to the Local Union. After the Local Union has the letter, the employer will call the Union and confirm that the letter is genuine and that the Union should dispatch the employee. All of the employees to whom letters such as the one written for Mr. Murray come to the employer and pick up the letter and deliver it. Mr. Phillips testified that he has never mailed any letter to the Union and that he did not mail this letter to the Union.

Mr. Murray did not go to Mr. Phillips or anyone else at N.E.C. to be interviewed for the position which Mr. Murray was seeking. According to Mr. Phillips, Mr. Murray was interviewed by Mr. Wohadlo, who is president of GWF. This company, Mr. Phillips testified, was formed in order to create N.E.C. In this respect, N.E.C. is a division or subdivision of GWF. Mr. Murray solicited a job from Mr. Wohadlo, and Mr. Wohadlo, in turn, sent a letter to Mr. Phillips asking whether Mr. Phillips could find a place for the grievant. Mr. Phillips prepared the letter in response to Mr. Wohadlo's request, but neither he nor anyone else at N.E.C. called the grievant to inform him that a letter was available, nor did the grievant call N.E.C. to see if a letter was prepared requesting his dispatch. At the time the letter was written, Mr. Phillips testified, he had never met Mr. Murray nor talked to Mr.

---

[2] Grievant Exhibit #1.

Murray by phone. The only contact Mr. Phillips had with Mr. Murray was the fact that Mr. Wohadlo had requested that he find a place for Mr. Murray.

Mr. Gary Barton, who acts as the employer's timekeeper, testified that on the same day that a request letter was written for the grievant, one was written for Raoul Luna. Mr. Luna picked up the letter and took it to the Union and was dispatched. According to Mr. Barton, Mr. Luna has been working for the Employer as a laborer ever since his dispatch. When the grievant came in to complain to the Employer about the fact that he was not dispatched to the job, Mr. Barton prepared a letter for Mr. Phillips' signature which states that the Union was notified by phone that Mr. Murray was going to be requested for N.E.C. work.[3] The letter was prepared at the request of Mr. Murray.

Mr. Gary Heberlein, a laborer working out of 324's hiring hall, testified that sometime on or about December 7, 1988 while he was in the hiring hall, Jessie Duran, one of the Union's agents, informed him that Mr. Murray had received a letter. According to Mr. Heberlein, when he told Jesse Duran, the Union's agent, that he did not know who Mr. Murray was, Mr. Duran responded, "Well, he is the guy who has been writing the letters to GWF kissing ass to get a job out there, and he finally got a letter." A week or two after this, Mr. Heberlein testified, he encountered Mr. Murray and told him, "I heard you were working out at N.E.C." In response to this, Mr. Murray told him, "No. I've been in school." He told Mr. Murray, "Well, they told me that you had a letter and you were out there working."[4] On January 4, Mr. Heberlein testified, he was dispatched to N.E.C. and has been working there since that date on a regular basis.

Mr. Murray testified that he was dispatched to the Laborers' training center on November 21, 1988 to par-

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[3] Grievance Exhibit #2.

[4] Tr. Page 52.

ticipate in a regularly scheduled training program at the center. During his stay, he received approximately $21 a day to cover meals and transportation. The course dealt with landscaping and was scheduled to last for four weeks. The course ended, according to Mr. Murray, on December 16, 1988. On the following Monday, December 19, Mr. Murray went to the Pittsburg hall of Local 324 to reactivate his "plug." It was while he was in the hall that he discovered that N.E.C. had written a letter requesting his services on one of its jobs. Mr. Murray called Mr. Phillips at N.E.C. and asked about the letter. He was informed that a letter was written and that it was held open for a period of a week, but that the employer filed the letter when the grievant failed to pick it up. Mr. Murray asked that this information be put in writing, and he went out and obtained a letter stating this information.[5] Mr. Murray testified that he never saw the letter requesting his services, nor did he believe anyone from the Union had seen the letter or had a copy of the letter.

POSITION OF THE PARTIES

GRIEVANT

The grievant argued that the undisputed testimony shows that a letter requesting the grievant's services was issued by N.E.C. on or about December 7, 1988. At that time, the grievant was attending the Laborers' training session, participating in a four-week landscaping course. Local 324 made no effort to contact the grievant at the training center to inform him of the requested dispatch. In the past, the grievant argued, when an employee has been at the training center, they have received dispatches to jobs, although the grievant conceded that he was not aware of any individuals from Local 324 that had received calls while they were participating in a training program at the training center. The failure of the Union to call the grievant was not accidental; it was intentional. The

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[5] Grievant Exhibit #2.

appropriate remedy, according to the grievant, was to compensate him for all of the time he could have been working at N.E.C. had he been dispatched properly.

UNION

The Union pointed out that the grievant could not name a single individual who had been dispatched by Local 324 when they were in the middle of a training session at the Laborers' training center. When an individual enrolls in a training program, it is anticipated that the employee will complete the course. The grievant acknowledged his unavailability by referring to reactivating his plug on December 19 when he finished the course. The testimony of the grievant which is accurate, the Union pointed out, is that when an individual is in the training center, their plug is maintained on the board just as if they were unemployed and in the hall. However, the Union does not dispatch from the hall while the person is in the training center because they are unavailable for work.

The facts in this case, the Union pointed out, establish that the grievant sought employment by writing to the president of GWF. The president of GWF then sent a letter to the local manager, Mr. Phillips, requesting that he find a place for the grievant. To accommodate his boss, the Union stated, Mr. Phillips wrote a letter for the grievant requesting his services. No one from N.E.C. bothered to contact the grievant, and the grievant never followed through to see whether N.E.C. would request his assistance. The Union was informed by N.E.C. on the telephone that a letter had been issued to Mr. Murray, but the Union followed the procedure that it has followed for many years which is to wait until the employee brings the letter from the employer before issuing a dispatch. Under the terms of the Contract, the Union does not have a right to dispatch an individual based on an oral request from the Employer. A named request such as the situation involving the grievant has to be in writing. As Mr.

Barton stated in his testimony, when he has, in the past, written a letter which an employee does not pick up, that employee is not dispatched from the hiring hall to the employer. It is the grievant who failed to properly follow through in this case, the Union pointed out and not the Union.

DISCUSSION

The Contract language affecting this dispute is clear and unambiguous. First, with respect to availability, the grievant's participation in the Laborers' training program clearly made him unavailable within the meaning of Section 3(b)(7). In order to be available for work, the individual must be "present at the hiring hall. . ." It is the opinion of this arbitrator that participating in a regularly scheduled four-week training program makes the employee unavailable for work through the dispatch process in the hiring hall. It is unlikely that the parties contemplated setting up regular training programs, paying participants to attend the programs, and then allowing the participants to be dispatched to other work halfway through the course. There is nothing in the contract which would suggest this conclusion, and it is not a conclusion which makes sense. The only sensible conclusion is that the grievant's participation in the training program, which was voluntary on his part, made him unavailable for work within the meaning of the Contract.

The grievant had no right to be dispatched on December 7, 1988 in the absence of a letter from N.E.C. The only information the Union had concerning N.E.C.'s request for the grievant was a telephone call informing the Union that the grievant had a letter which the Union could expect him to bring to the hall. The grievant, of course, failed to pick up the letter from N.E.C. and carry it to the Union. Without a written request, the Union was precluded from dispatching the grievant under Section 3(B)(6)(e). Had the Union dispatched the grievant in spite of the fact that he had no letter, some other employee in the hiring hall would have had a complaint

against the Union for which the Union would have been responsible for wages and fringe benefits.

For some reason, the grievant believed that the Union had an obligation to send someone over to the Laborers' training center and inform him that N.E.C. had a letter waiting for the grievant at its offices if the grievant wished to go over and pick it up. There is no contractual obligation on the part of the Union to assist employees in finding their own employment outside the scope of the hiring hall. If an employee chooses to find work outside the scope of the hiring hall, it is the obligation of the employee to meet all the requirements in order for the Union to dispatch the employee. The restrictions contained in the hiring hall rules and regulations are intended to make work available equally for all members of the Union. For the Union to assist an employee to find work outside the scope of the hiring hall rules would have the impact of discriminating against all of those other employees in the hiring hall who are attempting to seek work. Not only is what the grievant seeking a violation of the hiring hall rules and regulations, it is also contrary to the Union's publicly stated policy.

In summary, the grievant was not available for work on or about December 7 and could not have been dispatched to the N.E.C. job, even if he had a letter from the employer. The grievant was a participant in a training program which made him unavailable for work through December 16, 1988. Secondly, the grievant had no letter from N.E.C., nor did the Union have a letter from N.E.C. requesting the services of the grievant. The grievant sought a job from N.E.C. on his own outside the parameters of the hiring hall but failed to obtain a letter which would permit him to be dispatched to that job. The Union has no obligation to assist an employee in finding work outside the confines of the hiring hall. The grievance is denied.

AWARD

The Union did not violate the terms of the hiring hall provisions of the Laborers' Master Agreement in the manner in which it treated the grievant. The grievance is denied.

It is so ordered.

May 19, 1989

/s/ Gerald R. McKay
GERALD R. MCKAY
Arbitrator